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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 172

JOSEPH Y. HOUGHTON, *Petitioner*,

v.

J. WILLIAM PIKE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARLETON U. EDWARDS II
1000 Vermont Avenue, N.W.
Washington, D.C.
Counsel for Petitioner
Joseph Y. Houghton

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, Joseph Y. Houghton,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled action on January 14, 1965.

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[1] Petitioner here was Respondent in the Trial Court. To avoid confusion we will refer to "Houghton" and "Pike" where appropriate.

CITATIONS TO OPINIONS BELOW

The order of Judge Sirica of the U.S. District Court entered in this matter on March 3, 1964 (R. 12) (providing for de-impoundment of the District Court record involved on Pike's petition), is not strictly speaking an "opinion", but is printed in Appendix A hereto, *infra*, p. 1a.

The judgment (and opinion) of the Circuit Court of Appeals, dismissing Houghton's appeal (on the ground that Houghton had "no personal interest in the outcome of events which transpired in the District Court and . . . that he has no standing to appeal . . .") also unreported is printed in Appendix A, hereto, *infra*, p. 2a.

The Circuit Court of Appeals "Order" dated February 23, 1965, denying the Petition for Re-Hearing En Banc, is printed in Appendix A, *infra*, p. 4a.

In addition, the 1959 order and opinion of this court in *Spevack* v. *Strauss, et al.*, dated March 23, 1959, 79 S. Ct. 721, 359 U.S. 115, 3 L. Ed. 2d 673 (which remanded that case to the District Court, continued the previously entered restraining orders until the Spevack patent should issue and ordered that then, the "proceedings had in the two lower courts are vacated"), and the order of U.S. District Court Judge Letts in said case dated July 23, 1959, entered pursuant to the aforementioned order and opinion of this Court (which continued in effect the impounding of the District Court record), which orders petitioner Houghton contends are controlling in this matter, are printed in Appendix A, *infra*, pp. 4a and 6a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 14, 1965, and is printed as Appendix A hereto, p. 2a. Rehearing was denied on February 23, 1965 (Appendix A, *infra*, p. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

In the circumstances of this case—

A. Where, in 1957, a civil action was filed by a plaintiff inventor in the U.S. District Court (CA 880-57) against members of the U.S. Atomic Energy Commission in their individual capacity to restrain them from alleged *ultra vires* acts in threatening to reveal the contents of said plaintiff inventor's invention pertaining to a secret process of manufacturing heavy water, which process had been revealed to said defendants some years prior to 1957, in confidence, after which they had directed plaintiff to apply for a U.S. Patent, which he had done, and after which the subject matter thereof had been placed under a "secrecy order" by the U.S. Patent Office at the instance of said defendants, and which "secrecy order" had prevented the plaintiff from revealing the process to anyone, and had accordingly prevented him from making application for foreign patents, which he desired to do, and,

B. Where, during such action in the District Court, the proceedings were held *in camera* for plaintiff's protection against damaging revelations relating to said secret process to others, and in which proceedings the defendants filed certain affidavits dealing with their activities tending toward publishing the details of the said process which activities had occurred shortly after the removal of said "secrecy order" and before plaintiff had had an opportunity to apply for numerous foreign patents on said process, and which activities if made public, even now, might expose some of said plaintiff inventor's foreign patents subsequently applied for and obtained to attack as to validity because of defendants' activities set forth in the aforementioned affidavits, and,

C. Where the several Courts, there concerned, including the U.S. Supreme Court, had, at plaintiff's instance and

for his protection, continuously impounded the U.S. District Court record including said affidavits, which impounding still remains important to said plaintiff for the reasons aforesaid, and

D. Where, during such civil action and in the proceedings relating thereto on appeal to the U.S. Court of Appeals, and in the U.S. Supreme Court on two occasions, the U.S. Supreme Court recognized as such the *ultra vires* acts of said defendants in proposing to publish the details of said process and restrained them from publishing such until after said plaintiff's U.S. patent issued, and

E. Where, in accordance with the 1959 mandate of the U.S. Supreme Court in said case, ordering "the proceedings" vacated, the District Court in 1959 continued in effect and refused to remove the said impounding after having been requested to discontinue same by attorneys representing said defendants, and,

F. Where the removal or withdrawal of said impounding order at this time might frustrate to a considerable extent if not completely reasons for and beneficial results flowing from said impounding order and from the other restraining orders of this Court which recognized defendant's acts as being *ultra vires* in this respect in seeking to reveal the contents of said process prior to plaintiff's application for foreign patents on said process,—

Do the acts of a patent attorney (in 1964), who had absolutely no connection with the said original 1957 action (CA 880-57), in merely filing with the District Court clerk a paper captioned "In Re Petition of J. William Pike for Access to Impounded Record" (which petition was given only a "Miscellaneous" caption and no "Civil Action" number), without filing a "complaint", *without disclosing for whom he was acting*, without either "real party in interest" being before the Court including the said plaintiff inventor for whose protection the said impounding order had been entered, and in merely *mailing* a copy of his said

"petition" to an attorney who had represented the plaintiff inventor in the 1957 action and an A.E.C. attorney, confer upon the District Court jurisdiction to set aside the earlier impounding order and de-impound the said record notwithstanding the 1959 order of this Court and the 1959 Order of the District Court entered pursuant thereto?

II

Even assuming arguendo, the District Court's jurisdiction in the 1964 matter over the subject matter and the necessary parties:

A. Was its action in de-impounding the said record in violation of this Court's order that ". . . the proceedings . . . are vacated"?

B. Was the matter *res adjudicata,* having already been considered and decided as between the original adversary parties concerned?

C. Was the said District Court's order of de-impoundment, under all the circumstances, a violation of basic and fundamental Equitable principles?

III

Was the Court of Appeals in error in dismissing Houghton's appeal, on the ground that he had "no personal interest in the outcome of the events which transpired in the District Court", when it is clear that he had as much, if not much more interest in the outcome than did Pike, and when the said Court should have set aside the 1964 District Court order because there was no jurisdiction in the first instance?

IV

Under the circumstances here presented, set out in Question I above, should not this Court grant certiorari in the exercise of its supervisory powers over the lower Courts,

and/or to resolve a conflict between the rulings of two District Court judges?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are Federal Rules of Civil Procedure, Rules 1, 2, 3, and portions of Rules 7 and 17, and the Preamble and part of Article III, Section 2, of the Constitution (printed in Appendix B, *infra*, p. 7a).

STATEMENT

Trial Court Had No Jurisdiction of This Matter

Petitioner Houghton denies that the Trial Court acquired any jurisdiction in this matter and he properly raised this contention in the Trial Court by Motion to Dismiss, *inter alia* for want of jurisdiction (R. JA 7, 8, 12) as is more fully discussed under the heading "The Instant Matter", *infra*. Said motion was denied (Appendix A, *infra*, p. 1a, R. JA 12).

Facts Antecedent to the Instant Matter (Generally R. JA 4-6)

On April 10, 1957, Jerome S. Spevack filed a Complaint (CA 880-57) for an Injunction against the members of the U.S. Atomic Energy Commission requesting that they be enjoined from publishing the subject matter of Spevack's invention which he had previously revealed to them, which invention was subject to a "secrecy order". A temporary restraining order was issued.

Proceedings on Spevack's Motion for Preliminary Injunction were held *in camera* to guard against public disclosures detrimental to Spevack. *Ex parte* exhibits most of which were affidavits (hereinafter sometimes called the "affidavits") prepared by employees and agents of A.E.C. were produced on their behalf, which asserted in substance that actions alleged to constitute a "publication" by said A.E.C. had occurred prior to the institution of said suit. Spevack challenged these contentions but the Court denied

his motion for injunction on the ground of mootness, solely on the basis of said affidavits and with no opportunity to cross-examine the affiants. The Court continued the injunction against disclosure by Strauss, et al., pending appeal, and ordered the entire record impounded because of said affidavits, which impounding continues until the present date.

Thereafter the said injunction against disclosure and the impounding of the record was continuously in effect through two separate opinions and decisions of the U.S. Court of Appeals, after each of which the U.S. Supreme Court granted certiorari. See *Spevack* v. *Strauss,* 101 U.S. App. D.C. 339, 248 F. 2d 752, vacated 78 S. Ct. 536, 355 U.S. 601, 2 L. Ed. 2d 525, and *Spevack* v. *Strauss,* 103 U.S. App. D.C. 204, 257 F. 2d 208, cause remanded 79 S. Ct. 721, 359 U.S. 115, 3 L. Ed. 2d 673.

Both Supreme Court decisions reflected the intense interest of the scientific community in protecting the interests of scientists and inventors, and in the merits of the controversy, as said decisions show that briefs *amici curiae* urging reversal were filed in each instance for the *American Chemical Society* and for the *Engineers Joint Council, Inc.,* scientific societies numbering many thousands of scientists among their membership.

After the Supreme Court had considered the case for the second time the injunction (stay) against disclosure was continued (until Spevack's U.S. patent involving the process in question issued, etc.), with the further direction that then "... the proceedings heretofore had in the two lower courts are vacated" (Appendix A, *infra,* p. 5a).

On July 23, 1959, the matter came on before U.S. District Court Judge Letts at which time counsel for Strauss et al. presented an order which provided for a deimpoundment of the record (among other things). Judge Letts refused to sign the proposed order and deleted the portion providing for the deimpoundment, and then signed the order as

amended (Appendix A, *infra,* p. 6a, and R. JA 14), and accordingly, the Clerk of the District Court continues to maintain the record impounded.

The Instant Matter

On January 31, 1964, the respondent, J. William Pike, a patent attorney, filed in the Clerk's office of the U.S. District Court a paper entitled "In Re Petition of J. William Pike for Access to Impounded Record", which was given the designation by the Clerk of "MISC 4-64" (R. JA 2). Pike did not identify the client for whom he was appearing but stated: *"He represents a client who is interested in determining when there was first published the subject matter of the Spevack U.S. patent application Serial No. 188,295 which eventually issued as patent No. 2,895,803."* No summons was issued and no process was served on anyone (R. JA 1), but Pike indicated by his certificate of service that he had mailed a copy of the said petition to Joseph Y. Houghton, (JA 3, 11), one of the attorneys representing Jerome S. Spevack in Civil Action 880-57 mentioned above which had concluded by the order signed by Judge Letts on July 23, 1959 (Appendix A, *infra,* p. 6a, R. JA 14).

The aforementioned "petition" was not served on Jerome S. Spevack, the person most interested in the impounding of the record in CA 880-57; and as mentioned above, the person whom J. William Pike was representing was not disclosed (R. JA 2).

Thereafter Houghton appeared in his own behalf and filed a Motion to Dismiss the said petition for want of jurisdiction on the basis, among others, that no "action" was pending, that neither "real party in interest" was before the court, and also that the matter had already been considered between the parties involved and decided by the court in CA 880-57, and that there was no statutory or other basis for the said petition (R. JA 7, 12).

Thereafter Houghton filed his affidavit indicating that he had received a copy of the aforementioned petition in the

mail but that he had no authority to submit the interest of Jerome S. Spevack in the matter to the jurisdiction of the Court (R. JA 11).

On March 3, 1964 the petition and motion to dismiss came on for hearing in the District Court and an order was signed denying Houghton's motion to dismiss and granting the petition and providing that the record remain impounded pending appeal if an appeal was noted from the order within five days, etc. (R. JA 12).

On March 6, 1964 the notice of appeal was filed (R. JA 15).

Thereafter the appeal was argued and on January 14, 1965, the Court of Appeals entered a Judgment (Appendix A, *infra,* p. 2a) dismissing the appeal on the ground that the appellant (petitioner here) Houghton "had no authority (on his own affidavit) to submit the interest of said Jerome S. Spevack to the jurisdiction of the Court . . ."

Thereafter a Petition for Rehearing In Banc was timely filed, was not opposed, but was denied on February 23, 1965 (Appendix A, *infra,* p. 4a).

REASONS FOR GRANTING THE WRIT

1. The writ should be granted to review and correct the failure of the courts below to follow and respect in this matter the 1959 mandate of this court in Spevack v. Strauss, et al., supra, as did Judge Letts' 1959 order entered pursuant thereto.

The mandate of this Court in *Spevack* v. *Strauss et al.,* 79 S. Ct. 721; 359 U.S. 115; 3 L. Ed. 673 included an order vacating "the proceedings had" in the two lower courts in that case, not just the judgments or orders entered therein. Judge Letts, pursuant to that mandate and order, maintained the record therein impounded. The mandate and order of this Court vacating "the proceedings had" permitted and permits no other course. To "vacate"

is to annul, to make void, to make of no authority or validity, to render without force or significance. To "annul" is to reduce to nothing, to annihilate, obliterate, blot out, to do away with. For the proceedings below to be blotted out and done away with, the impounded record of such proceedings had to be blotted out and done away with, and the only way available to follow this mandate and order was to maintain it impounded, so that it would be done away with so far as the public records are concerned. This was the action Judge Letts took in 1959 in following the mandate and honoring the Order of this Court. This was the only proper action under the mandate and order of this Court.

In the ruling now entered by the District Court (with neither real party in interest before it) the mandate and order of this Court is ignored, and the improper proceedings which this Court said should be obliterated are to be made a matter of public record contrary to this Court's order. And the judgment of the Court of Appeals in the present matter also disregards the 1959 mandate and order of this Court since it would condone the District Court's refusal to honor same.

Rulings of this Court are not to be lightly disregarded. *The Standard Parts Co.* v. *Peck*, 264 U.S. 52; 44 S. Ct. 239; 68 L. Ed. 560. A function of this Court is to supervise the lower Courts. In exercise of that function and to insure respect for its pronouncements and a proper operation of the judiciary the writ here prayed should issue.

2. The writ should be granted to review and correct the failure of the Court of Appeals to accord equal treatment before the law to both the persons appearing before it.

The judgment of the Court of Appeals would allow the ruling of the District Court to stand on the theory that Petitioner Houghton has no personal interest in the outcome of "events which transpired in the District Court",

and therefore has no standing to appeal.[2] Such judgment utterly disregards the fact that the instigator of the "events which transpired in the District Court" Mr. Pike, is certainly in no better position than the petitioner Houghton. Mr. Pike has not submitted his client to the jurisdiction of the Court. Mr. Pike admitted orally in the Courts below that he is representing a French law firm which in turn represents an undisclosed principal, which undisclosed principal is the real party interested in setting aside the 1959 order of this Court. Mr. Pike says he has standing to be heard without disclosing the real party whose interest he represents. He says he has standing as a member of the public and a member of the bar of the Courts below to be heard to urge that the impounding order maintained pursuant to the 1959 mandate and Order of this Court be set aside. But if such position gives him such right, clearly the Petitioner Houghton, who is also a member of the public and a member of the bar of the Courts below as well as of this Court, has equal standing to be heard to urge that the 1959 mandate and Order of this Court be honored, and that the protection it accorded to the party Spevack whom he represented in *Spevack* v. *Strauss, et al., supra,* and to the interested public there represented by the *Amici Curiae, American Chemical Society* and the *Engineers Joint Council, Inc,* be maintained.

The judgment of the Court below, in effect, accords Pike status to be heard as a member of the public and the bar, while denying Houghton the same right, and thus denys to Houghton the equal treatment before the law re-

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[2] *United States* v. *Siegel,* 83 U.S. App. D.C. 88, 168 F. 2d 143 (1948) cited by the Court of Appeals as authority for its action is not in point with the instant case, because there the United States sought to appeal from a lower court judgment, while "The United States was never a party to the record in the Court below". (83 U.S. App. D.C. 91). In the instant case Houghton was a "party to the record below", even though there were no proper parties in the case.

quired by Justice, in contravention of the preamble of the Constitution of the United States and of the contemplation of Article III, section 2 thereof. In exercise of its function to supervise the operation of the lower courts, this arbitrary action should be reviewed and corrected by this Court, and the writ prayed should therefor be granted for this reason.

3. The writ should be granted to review and correct the failure of the District Court and Court of Appeals to dismiss respondent Pike's petition for access for want of jurisdiction under Article III, Section 2 of the Constitution of the United States and under the laws and rules of Civil Procedure enacted pursuant to the Constitution. In more detail:

(a) The Trial Court should have dismissed the petition there brought by respondent Pike, because there was no action pending.

Here the respondent Pike merely filed a "Petition of J. William Pike for Access to Impounded Record". This petition which was given the Court designation "Misc. 4-64" is not an "action". Federal Rules of Civil Procedure—Rule 3, which states "A Civil Action is commenced by the filing of a complaint with the Court." No complaint has been filed in this case as shown by the docket entries (R. JA 1). It goes without saying that no summons has been served upon anyone as is also shown by the docket entries (R. JA 1).

In addition, the petition violates Federal Rules of Civil Procedure—Rule 7(b), which states in part, "Application to the Court for an order shall be by motion. . ."

(b) Responded Pike's Petition in the Trial Court should have been dismissed because neither "real party in interest" was before the Court.

The "petition" states in part: "He represents a client who is interested in determining. . ." Thus, the real party

in interest (his client) has not been disclosed and the petition violates Federal Rules of Civil Procedure—Rule 17(a), which states in part, "Every action shall be prosecuted in the name of the real party in interest. . ." The petition therefore shows on its face that the petitioner is not the "real party in interest."

In addition a very "real party in interest", Jerome S. Spevack, who sought to and succeeded in keeping the record impounded throughout the civil proceedings in Civil Action 880-57 (and to date), in the Court of Appeals and the U.S. Supreme Court is not a party to this matter nor is he before the Court merely by the petitioner Pike's action of mailing a copy of a petition to counsel who represented Spevack in a case which concluded in July, 1959 (R. JA 3).

(c) The respondent Pike's petition should be dismissed because there is no known statutory or other basis for the same.

The jurisdiction of the U. S. District Courts is prescribed by statute, and should be found in either the U.S. Code, the D.C. Code, or at least there should be some mention of it in the local Civil Rules. Petitioner's counsel has been unable to discover *any* statutory or other basis either in the laws referenced above or elsewhere, or any indication as to what rules apply (other than the Federal Rules of Civil Procedure, which apply to Federal Courts generally) in this matter. In the absence of some such basis, it is submitted that the lower court has no jurisdiction to entertain respondent Pike's "petition." Respondent Pike admits, or claims, that this is not a civil action. Petitioners asks, if it is not a civil action, then what is it, what is the authority for filing it, and what rules apply?

F.R. C.P. Rule 1 provides in pertinent part that "These rules govern the procedure in the United States District

Courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions states in Rule 81". There are no exceptions contained in Rule 81 which would exclude the present matter from the application of the Federal Rules. Certainly District Judge Letts' 1959 order entered pursuant to this Court's mandate, after consideration of the contentions and rights of the adversary parties, should not be overruled or set aside by the unorthodox procedure followed herein by the respondent Pike, which fails to follow the rules of civil procedure promulgated for orderly proceedings in the District Court, and which relies upon a mere "petition" which is not provided for anywhere.

Consider hypothetically that the Clerk of the District Court had on deposit a sum of money, in which an undisclosed client of Attorney Pike claimed an interest, which had theretofore been ruled to be the property of some third person. It is very much doubted that Pike could obtain possession of the same for his undisclosed client by filing a "petition", and following the general procedure he has followed herein, and merely mailing a copy of his said petition to an attorney who had represented the party deemed to be the owner by the former ruling between adversary parties. While not a direct analogy, it is submitted that this hypothetical situation is sufficiently similar to show the impropriety and shortcomings of the procedure resorted to by Pike in the District Court and condoned by the Court of Appeals herein.

In condoning the procedure employed by Pike, which has no foundation in the statutes and rules enacted under the Judicial Power of the United States, the Courts below have acted outside their Constitutional Jurisdiction, and the writ should issue to correct such excess.

4. The writ should be granted to review and correct the violations of the principles of Equity Jurisprudence recognized by this Court in its 1959 Mandate in Spevack v. Strauss, supra.

Spevack revealed his improved process to the Atomic Energy Commission in confidence and the 1959 decision and order of this Court, maintaining the injunction in *Spevack* v. *Strauss et al*, constituted a clear ruling that the Respondents there had no right to publish Spevack's invention prior to his own publication thereof by issuance of his patent, and that hence any steps they may have taken toward doing so were improper and *ultra vires*.

While there is no such equitable axiom as "that which ought not to have been done will be regarded as not having been done . . .", basic principles of equity would seem to support this as a principle of equitable jurisprudence. While it is not felt that the materials in the affidavits, if properly evaluated, would have the affect of invalidating any of Spevack's patents, the release thereof could result in litigation by those seeking to benefit therefrom and cause him much expense and harassment.

In directing that "the proceedings had in the two lower courts are vacated" the 1959 mandate of this court showed a clear recognition that Spevack is entitled to be protected against publication of the unwarranted and improper affidavits introduced into the record by the said respondents. This fact was clearly recognized by Judge Letts, and the failure of the Courts below in the present matter to adhere thereto is a clear violation of the principles of Equitable Jurisprudence.

5. The writ should be granted because this matter presents a question of importance to the community at large, as to whether orders of this Court will be respected by the lower courts, and a conflict of decision with respect thereto.

This matter presents a question of great public importance, namely: Can a mandate and order of the Supreme Court—interposed to protect an inventor's trade secrets from destruction by unauthorized publication by Government officers and to protect him from harassment by publication of impounded records pertaining to attempts to affect such destruction—be relied upon to accomplish such purpose and settle the matter; or can that mandate and order be simply disregarded by a District judge who in a separate proceeding is asked to disclose such impounded records?

This Court clearly indicated, in its 1959 decision and order in *Spevack* v. *Strauss, et al., supra,* an intent to protect Spevack not only from destruction of his property rights by improper publication by government officers, but also from harassment by publication of the impounded record in that case. The decision and order of this Court that "the proceedings heretofore had in the two lower Courts are vacated" was clearly designed to prevent such harassment, and was so treated by Judge Letts, who refused to de-impound said record. The District Judge acting in the present matter has either disregarded or taken a conflicting view of the effect to be given to the order of this Court. Certiorari should be granted so that this Court can correct this conflict of views as to the respect to be accorded its orders, and so that members of the scientific community and the public generally can rely on the fact that orders issued by this Court cannot be set aside by an inferior court to frustrate the purpose for which they were entered.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARLETON U. EDWARDS II
1000 Vermont Avenue, N.W.
Washington, D.C.

Counsel for Petitioner
Joseph Y. Houghton

APPENDIX

APPENDIX A

[Filed Mar. 3, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE PETITION OF J. WILLIAM PIKE
FOR ACCESS TO IMPOUNDED RECORD

Misc. No. 4-64

Order

This matter having come on for hearing upon the "Petition of J. William Pike for Access to Imounded Record" (in Spevack v. Strauss et al., C.A. 880-57 in this Court), and upon "Respondent's (Joseph Y. Houghton) Motion to Dismiss Petition for Want of Jurisdiction and for Lack of Indispensable Parties, etc." (and Supplement thereto), and upon consideration of the pleadings filed herein and a copy of the Order of Judge B. Dickinson Letts signed July 23, 1959 in said C.A. 880-57, which is a part of the impounded record in said case (a copy of which order is made a part of the record herein); and arguments of counsel in open Court, it is, this 3rd day of March, 1964,

ORDERED:

1. That the Respondent's Motion to Dismiss the Petition be and the same hereby is denied;

2. That the said Petition for Access to said impounded record be and the same hereby is granted, *provided however*, that said record shall remain impounded for a period of five days from the date of the signing of this order for the purpose of giving the respondent time within which to file an appeal to the appropriate Court, and *provided further*, that in the event an appeal is not noted within said five day period, said record shall be released from the order of impoundment, and *provided further*, that in the event an appeal is noted to the appropriate Court, the said record

shall remain impounded subject to final disposition of the matter on appeal.

/s/ JOHN J. SIRICA
Judge

Seen:

J. WILLIAM PIKE
J. William Pike, *Petitioner*

CARLETON U. EDWARDS II
Carleton U. Edwards II, *Attorney for Joseph Y. Houghton*

JOSEPH M. HANNON
Joseph M. Hannon, *Asst. U. S. Attorney*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,630

Misc. 4-64

JOSEPH Y. HOUGHTON, *Appellant,*

v.

J. WILLIAM PIKE, ET AL., *Appellees.*

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Edgerton, Senior Circuit Judge, and Wright, Circuit Judge.

Judgment

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel, and it appearing to the court that the person filing this appeal has stated

under oath that "I have no authority to submit interest of said Jerome S. Spevack to the jurisdiction of the court in this . . . matter and submit that none exists as a matter of law merely because I represented him in [*Spevack* v. *Strauss*] . . . ," and it further appearing that said person has no personal interest in the outcome of the events which transpired in the District Court, which he seeks to appeal, and it therefore appearing that he has no standing to appeal, it is

ORDERED and ADJUDGED by this court that the appeal herein is dismissed. Rule 73(a), Fed. R.Civ.P.; *United States* v. *Siegel*, 83 U.S. App.D.C. 88, 168 F.2d 143 (1948). The court expresses no opinion as to the collateral vulnerability of the proceedings below. The stay presently effective will be dissolved upon issuance of the certified copy of the judgment of this court, which shall occur in due course.

It is further ORDERED by the court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Curiam

Dated: Jan. 14, 1965

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,630

JOSEPH Y. HOUGHTON, *Appellant,*

v.

J. WILLIAM PIKE, ET AL., *Appellees.*

Before: Bazelon, Chief Judge, and Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges in Chambers.

Order

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the Court *en banc* that appellant's aforesaid petition is denied.

Per Curiam

Dated: Feb. 23, 1965

Per Curiam.

SPEVACK v. STRAUSS ET AL.

Certiorari to the United States Court of Appeals for the District of Columbia Circuit

No. 339. Argued March 5, 1959—Decided March 23, 1959.

It appearing upon oral argument that in the normal course the fee for petitioner's United States patent must be paid by May 25, 1959, and that the patent will issue shortly after payment of the fee, the case is remanded to the District Court with instructions.

Reported below: 103 U. S. App. D. C. 204, 257 F. 2d 208.

Carleton U. Edwards II and *Joseph Y. Houghton* argued the cause for petitioner. With them on the brief was *Bernard Margolius.*

Leonard B. Sand argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Lionel Kestenbaum, Loren K. Olson* and *Roland A. Anderson.*

Briefs of *amici curiae* urging reversal were filed by *Elisha Hanson, Arthur B. Hanson* and *Calvin H. Cobb, Jr.* for the American Chemical Society, and by *Carlton S. Dargusch* and *Carlton S. Dargusch, Jr.* for Engineers Joint Council, Inc.

PER CURIAM.

Upon oral argument, it appeared that in the normal course the fee for petitioner's United States patent must be paid by May 25, 1959, and that the patent will issue shortly after payment of the fee. Accordingly, the case is remanded to the District Court and that court is instructed: (1) If petitioner has by May 25, 1959, paid the patent fee for his patent, and has not requested a suspension or delay in the issuance thereof, or has withdrawn any such request theretofore made, to continue the case and the restraining orders entered herein by THE CHIEF JUSTICE until the patent issues, and then to dismiss the complaint as moot; (2) otherwise, on May 25, 1959, to dismiss the complaint on the ground that, apart from the merits of the controversy, the grant of the extraordinary equitable relief of an injunction at that stage of the proceedings would not be warranted. Upon the fulfillment of either of these conditions, the proceedings heretofore had in the two lower courts are vacated.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUL 23 1959
Barry M. Ed. Clerk

JEROME S. SPEVACK,

Plaintiff,

v.

LEWIS L. STRAUSS, et al.,

Defendants.

CIVIL ACTION
NO. 880-57

ORDER

Upon consideration of the remand of this cause to this Court by the Supreme Court of the United States with instructions to dismiss this complaint as moot upon the issuance of the patent applied for (Patent No. 2,895,803, issued on Application Serial No. 122,025) by the plaintiff, and the said patent having issued on July 21, 1959, it is by the Court this 23rd day of July, 1959,

ORDERED, that the complaint be and the same hereby is dismissed as moot; ~~and it is~~

~~ORDERED, that the records and minutes of this Court relating to this cause be and the same hereby are no longer suspended.~~

JUDGE

APPENDIX B

Constitution of the United States of America

WE THE PEOPLE of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

* * *

ARTICLE III

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

* * *

Federal Rules of Civil Procedure

Rule 1. *Scope of Rules.* These rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. *One Form of Action.* There shall be one form of action to be known as "civil action".

Rule 3. *Commencement of Action.* A civil action is commenced by filing a complaint with the court.

Rule 7. *Pleadings Allowed; Form of Motions.* * * *

(b) *Motions and Other Papers*

(1) An application to the court for an order shall be by a motion. . . ."

Rule 17. *Parties, Plaintiff and Defendant; Capacity.*

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 172

JOSEPH Y. HOUGHTON, *Petitioner*,

v.

J. WILLIAM PIKE, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS D. THOMAS, JR.
540 Shoreham Bldg.
Washington 5, D. C.
Counsel for Respondent
J. William Pike

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ARGUMENT IN OPPOSITION TO PETITIONER'S REASONS FOR GRANTING THE WRIT

Petitioner assigns five reasons for his belief that this Court should grant his petition for a writ of certiorari in the present case. These reasons are set forth as follows:

> "1. The writ should be granted to review and correct the failure of the courts below to follow and respect in this matter the 1959 mandate of this court in Spevack v. Strauss, et al., supra, as

did Judge Letts' 1959 order entered pursuant thereto.

"2. The writ should be granted to review and correct the failure of the Court of Appeals to accord equal treatment before the law to both the persons appearing before it.

"3. The writ should be granted to review and correct the failure of the District Court and Court of Appeals to dismiss respondent Pike's petition for access for want of jurisdiction under Article III, Section 2 of the Constitution of the United States and under the laws and rules of Civil Procedure enacted pursuant to the Constitution.

"4. The writ should be granted to review and correct the violation of principles of Equity Jurisprudence recognized by this Court in its 1959 Mandate in Spevack v. Strauss, supra.

"5. The writ should be granted because this matter presents a question of importance to the community at large, as to whether orders of this Court will be respected by the lower courts, and a conflict of decisions with respect thereto."

It is contended that these reasons are collectively and individually without merit and that the petition for a writ of certiorari should be refused. The Petitioner's first reason in support of the granting of the writ is highly technical in nature, as has been the case with the great majority of his pleadings and arguments from the outset, and amounts to nothing more than an exercise in semantics. It is the Petitioner's position that this Court's 1959 Per Curiam opinion, set forth in full at pages 4a and 5a of Petitioner's Appendix, requires that the record in the lower court be forever impounded. This is based on the Court's statement that upon the fulfillment of either of two conditions previously set

forth, "the proceedings heretofore had in the two lower courts are vacated."

It is submitted that the Court says no more than that regardless of whether the District Court dismisses the complaint as moot because Petitioner has caused his patent to issue, or whether the District Court, if Petitioner has failed to effect the issuance of his patent by duly paying the normal fee, dismisses the complaint on the ground that the extraordinary relief of an injunction would not then be warranted, the effect is the same in either case in that all of the proceedings had heretofore become meaningless and hence are annulled.

This was by no means an order that the record in the District Court remain impounded, and it is believed that the Court would have expressly stated that the record was to remain impounded, if it had wanted to include this as a part of its order. It is contended that the Petitioner's interpretation of the decision in Spevack v. Strauss et al. is most inconsistent with the fact that the Respondent here was granted free access to the briefs filed during the proceedings in this Court, which briefs show that affidavits are in existence detailing what has been done by the Atomic Energy Commission in publishing the Spevack invention and revealing much as to their content.

It is true that in the final order signed by Judge Letts, a portion calling for deimpoundment of the record is struck out, but there is no indication as to why this was done. Insofar as it appears on the record, this might well have been because Judge Letts considered it superfluous in that the record was automatically deimpounded upon entering of the order.

In any event, it is Respondent's contention that the U. S. District Court for the District of Columbia has

direct control over its records and that it is entirely a matter within the discretion of the Court whether the record in any particular action be impounded or not. This control is a continuing one and it is within the discretion of the Court to decide when and under what conditions a previously impounded record should be deimpounded.

There is no merit whatever to the second reason advanced in support of the granting of the petition for a writ of certiorari. Respondent initiated the present matter by petitioning for access to the impounded record in Spevack v. Strauss et al. This is by no means equivalent to bringing an action at law and a copy of the petition was served on the attorneys for the parties involved in the original suit merely in order that they would have an opportunity to show that they would be injured by the deimpoundment of the record, if such were the case.

However, Spevack apparently chose to reject the opportunity offered. Rather Houghton, the Petitioner here, attempted to defeat the petition for access by pleading numerous technicalities which had no bearing on the matter.

It was in response to this line of approach that the Circuit Court of Appeals ruled against Houghton by saying that since he had stated on the record that he had no authority to submit the interests of Jerome S. Spevack to the jurisdiction of the Court and had alleged that he had no personal interest in the outcome of the events which transpired in the District Court, he had no standing to appeal, and the appeal was accordingly dismissed.

The present Respondent has, however, made it clear from the outset that he was merely petitioning the Court to exercise its inherent discretionary power and deimpound a record which should have been deimpounded upon termination of the original suit. He has made it clear from the outset that he does not believe that he has any more right to access to the impounded record than does any member of the public at large.

Certainly, in view of this, it cannot be said that the Court of Appeals failed to accord equal treatment before the law to both the persons appearing before it.

Reason number 3 is a perfect example of Petitioner's attempt to rely upon technicalities to defeat Respondent's petition for access to the impounded record where this is clearly not appropriate.

It is Respondent's position that every court has jurisdiction over its own records. If a court has within its discretionary powers the right to impound, for good cause shown, the record of a judicial proceeding, in the face of the recognized policy which dictates that wherever possible all such proceedings be completely open to public inspection, it certainly has the right, within this same power, to deimpound a previously impounded record if it is convinced that this is warranted by present circumstances.

It is submitted that it is perfectly proper for a member of the public to request that a court exercise its discretionary powers, as was done here. No statute is involved and certainly the Federal Rules of Civil Procedure are not controlling in any way, since no civil action has been brought.

Reasons 4 and 5 given by the Petitioner for granting the writ may be treated together. They represent a belated and weak attempt to oppose the petition for access on the merits, where this should have been done in the hearing before Judge Sirica in the District Court.

Insofar as the question of deimpoundment is based on the true merits of the situation, it is not seen, nor has it been shown, that Mr. Spevack will be in any way injured by the release of the record for public inspection. Petitioner contends in the first place that the material in the affidavits would not have the affect of invalidating any of Mr. Spevack's patents, but in the same breath speculatively says that the affidavits could result in considerable litigation and cause him much expense and harassment. Since Mr. Spevack is the patent owner, it is obvious that he would be the initiating party to any litigation and that he would not be "harassed" under any circumstance. If Petitioner means that there is something in the impounded material which would lead one to believe that a particular patent could safely be ignored, then it is in the public interest that such material be made available. Moreover, it is believed to be obvious that the potential infringer, knowing from the briefs before the U. S. Supreme Court that the Atomic Energy Commission had asserted in the record of the District Court that it had previously published the invention, would not be any more apt to honor the patent than he would if he had been able to gain access to said record for the purposes of evaluation. If the impounded record becomes available, and one sued by Mr. Spevack attempted to employ it as a defense, Mr. Spevack would

have full and ample opportunity to attack it on any proper ground.

Respondent is not concerned with the question of whether any action taken by the Atomic Energy Commission to publish Mr. Spevack's disclosure was right or wrong, but he does believe that he, or anyone else, should have the right to determine the exact nature of this publication, assuming it is an accomplished fact.

As was pointed out earlier, the 1959 Per Curiam opinion of this Court in Spevack v. Strauss et al. does not show, as contended by Petitioner, that Spevack is entitled to be protected against publication of the affidavits introduced into the record. The opinion does not represent any decision on the merits. It merely says that the restraining orders then in effect should be maintained until Spevack made their continuance moot by issuing his patent, or, if he failed to do this, his complaint should be dismissed on the ground that the granting of an injunction would not then be appropriate. This is certainly no ruling that there should be suppressed the knowledge of acts committed by the Atomic Energy Commission *before* the restraining orders were entered.

Accordingly, the granting of the petition for access does not represent a refusal by the District Court to respect the orders of this Court. Morevor, since there was no express decision by Judge Letts that the impoundment of the record be continued then or in the future, the granting of the petition for access does not represent a conflict in the decisions of the District Court.

CONCLUSION

The petition for a writ of certiorari should be refused.

Respectfully Submitted,

FRANCIS D. THOMAS, JR.
540 Shoreham Bldg.
Washington 5, D. C.
Counsel for Respondent
J. William Pike